152 U.S. 368

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 244.

WILLIAM B. MADDOCK, PLAINTIFF IN ERROR,

vs.

DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 13, 1890.

(14,259.)

(14,259.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 244.

WILLIAM B. MADDOCK, PLAINTIFF IN ERROR,

vs.

DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Summons	3	2
Writ of certiorari	5	2
Complaint	7	3
Bill of particulars	9	5
Answer	11	6
Minutes of trial	13	7
Judgment	14	8
Bill of exceptions	15	8
Statement of evidence	15	8
Charge to jury	16	9
Plaintiff's request	17	9
Judge's certificate	17	9
Assignment of errors	18	9
Joinder in error	20	10
Bond	22	11
Citation	24	12
Proof of service of citation	25	12

A

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1893.

A for copy of testimony of U.S. Attorneys Office.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

[Seal of U. S. Circuit Court, South. Dist. New York.]

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William B. Maddock, plaintiff, and Daniel Magone, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the part- aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctiy and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and ninety, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 30th day of July, in the year of our Lord one thousand eight hundred and ninety.

JOHN A. SHIELDS, *Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 25, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of William B. Maddock, plaintiff in error, against Daniel Magone, defendant in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 25th day of September, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] E. & A. A., 925. 12276. U. S. Supreme Court. William B. Maddock, plaintiff in error, against Daniel Magone, defendant in error. Writ of error. Charles Curie, attorney for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this 31 day of July, 1890. Edward Mitchell, U. S. attorney, attorney for defendant in error. P. 145 ch.
[File-mark:] U. S. circuit court. Filed Jul- 31, 1890. John A. Shields, clerk.

3 Superior Court of the City of New York.

WILLIAM B. MADDOCK, Plaintiff,
against
DANIEL MAGONE, Defendant. } Summons No. 1.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated New York, Ap'l 2, 1888.

——— ———,
Plaintiff's Attorney,
Offices, Nos. 44 Exchange Place, New York City.

4 [Endorsed:] No. 12276. No. 1. N. Y. superior court. William B. Maddock, plaintiff, against Daniel Magone, defendant. Summons. Chas. Curie, plaintiff's attorney, 44 Exchange place, New York city. Received, U. S. attorney's office, April 4, 1888. Due service hereof admitted this 2nd day of Ap'l, 1888. Personally served April 2, 1888. Custom-house, New York, April 2d, 1888. D. N.

5 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

[L. S.] We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Daniel Magone, defendant, by William B. Maddock, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 30 day of April, 1888, as fully and amply as the same are remaining before you by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Hon. Samuel F. Miller, senior associate justice of the

Supreme Court of the United States, the 23 day of April, in the year one thousand eight hundred and eighty-eight.

TIMOTHY GRIFFITH, *Clerk.*

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

6 [Endorsed:] 12276. U. S. circuit court. William B. Maddock *vs.* Daniel Magone, Copy certiorari. Edward Mitchell, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, April 23, 1888. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant. To C. C., plaintiff's attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, April 23, 1888. Chas. Curie, plaintiff's attorney.

7 Circuit Court of the United States for the Southern District of New York.

WILLIAM B. MADDOCK, Plaintiff,
against
DANIEL MAGONE, Defendant. } Complaint.

Plaintiffs complain-:

1st. That defendant was, during the time hereinafter named, collector of customs of the United States, at the port of New York.

2d. That plaintiffs *were, during said times, partners in trade under the firm name of* W. B. Maddock *and, as such,* duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. The defendant, as such collector, exacted from plaintiffs, as and for duties thereon, and plaintiffs, in order to obtain said goods, *were* compelled to pay, and did pay, the sum of eighty-three & $\frac{70}{100}$ dollars, in excess of the amount required by law.

4th. That plaintiffs filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. The plaintiffs made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals, when this action was commenced.

6th. That the bill of particulars, hereto annexed, states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the

appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. That said sum, so exacted as aforesaid, has never been repaid to plaintiffs, and is still due and owing to *them*.

Wherefore, plaintiffs demand judgment against defendant for eighty-three & $\frac{70}{100}$ dollars, with interest on the several sums named in the bill of particulars, from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
Attorney for Plaintiffs.

8 [Endorsed:] 12276. U. S. circuit court. William B. Maddock, plaintiffs, against Daniel Magone, defendant. Complaint. Chas. Curie, plaintiff's attorney, 44 & 46 Exchange place, New York city. Received, U. S. attorney's office, May 5, 1888.

9 *Bill of Particulars.*

Name of importer, W. B. Maddock.

		Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
					1886.	1886.		1886.	1887.		1888.
209	1	China toys.....	L'pool.....	Italy	Sept. —	Oct. 13	9 70	Oct. 13	M'ch 23	M'ch 23	Jan. 24.
								1887.			
	2	" "	"	Queen...	Aug. 7	Aug. 27	27 50	Jan. 5	Jan. 6	Jan. 6	No. ans. rec'd.
											1888.
	3	" "	"	Spain....	" 28	Sept. 13	28 00	" 13	" 13	" 13	Jan. 24.
	4	" "	"	Egypt....	Sept 4	" 20	18 50	Feb. 14	Feb. 14	Feb. 14	" 24.

10 [Endorsed:] 12276. U. S. circuit court, southern district of New York. Wm. B. Maddock against Daniel Magone. Bill of particulars. New York, May 5, 1888. To Stephen A. Walker, Esquire, defendant's attorney. Sir: Please to take notice that this action is brought to recover duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars. Chas. Curie, plaintiff's attorney, 44 & 46 Exchange place, New York city. Received, U. S. attorney's office, May 5, 1888.

Circuit Court of the United States for the Southern District of New York.

WILLIAM B. MADDOCK
versus
DANIEL MAGONE, Collector, etc. } N. S. 12276.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty, on the goods referred to in the complaint, was as stated in the complaint; and he denies that the plaintiff *were* compelled to pay or did pay to the defendant as collector or otherwise the sum stated in the complaint, or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiff filed with the defendant any protest or protests as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiff.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And further answering, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And further answering, he alleges that this action was not brought within ninety days after the decision of the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon; or within ninety days after payment of duties paid thereon after such decision.

VIII. And further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And further answering, the defendant alleges that all moneys received by him from the plaintiff, in respect of the importations in the complaint alleged to have been made, were demanded of the plaintiff and were by the plaintiff voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiff paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

X.-And further answering, the defendant alleges that all moneys received by him from the plaintiff in respect of the importations in the complaint alleged to have been made, were sums due from the plaintiff to the United States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiff and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's entry thereof were collected or received by defendant from the plaintiff.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

12 [Endorsed:] 12276. U. S. circuit court, southern district of New York. W. B. Maddock *vs.* Daniel Magone, collector, etc. Answer. Stephen A. Walker, United States attorney, attorney for defendant. Sir: Please to take notice that the within is a copy of an answer this day filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Dated New York, December 14th, 1888. Yours, &c., Stephen A. Walker, U. S. att'y & att'y for def't. To Charles Curie, Esq., attorney for plaintiff. Due service of a copy of an answer, of which the within is a copy, and of the above notice, is hereby admitted. Dated New York, December 14th, 1888. Chas. Currie, attorney for plaintiff.

13 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the sixth day of January, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable E. Henry Lacombe, circuit judge.

WILLIAM B. MADDOCK
vs.
DANIEL MAGONE. } N. S. 12276.

Now comes the plaintiff, by Stephen G. Clarke, his attorney, and moves the trial of this cause. Likewise comes the defendant, by William Wickham Smith, assistant U. S. attorney, his attorney. Thereupon a jury is empaneled and the cause proceeds to trial.

After hearing the evidence for the respective parties and the argument of counsel, the jury say that they find the goods in suit are not toys, and, by direction of the court, that they find a verdict for the defendant, and so they say all.

On motion of Mr. Clarke, for the plaintiff, ordered that the plaintiff have a stay of sixty days in which to make and serve a case with leave to turn the same into a bill of exceptions.

An abstract of the minutes.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

nited States Circuit Court, Southern District of New York.

WILLIAM B. MADDOCK
vs.
DANIEL MAGONE. } Judgment, July 15th, 1890.

The issues in this action having been brought on for trial before Mr. Judge Lacombe and a jury, at a circuit court of the October term, 1889, and the issues having been tried and a verdict for the defendant having been duly rendered on the 6th day of Jan'y, 1890, and his costs having been adjusted at $54.85:

Now, on motion of Edward Mitchell, United States attorney for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $54.85, his taxed costs, and have execution therefor.

Judgment signed this 15th day of July, 1890.

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] N. S. 12276. United States circuit court. William B. Maddock *vs.* Daniel Magone. Judgment-roll. Edward Mitchell, United States attorney, attorney for defendant. Filed ——, 188–. Costs, $—. U. S. circuit court. Filed July 15, 1890, 12.45 p. m. John A. Shields, clerk.

15 U. S. Circuit Court,.Southern District of New York.

WILLIAM B. MADDOCK
vs.
DANIEL MAGONE. } N. S. 12276.

Plaintiff's Bill of Exceptions.

The issues in the above-entitled action came on for trial before the Hon. E. Henry Lacombe, circuit judge, and a jury on the 6th day of January, 1890. Charles Curie and Stephen G. Clarke, Esquires, appeared for the plaintiff, and William Wickham Smith, Esquire, assistant U. S. attorney, appeared for the defendant.

The plaintiff imported in the year 1886 into the port of New York certain goods, consisting of mugs, plates, cups, and saucers, made of china, of small size, and claimed by him to be dutiable as toys. Duty was assessed by the defendant and paid by the plaintiff at the rate of sixty per cent. ad valorem under protest as follows: "Against your decision and assessment of duties as made by you and the payment of more than 35% ad valorem on our importations below mentioned, consisting of certain china toys, claiming that under existing laws and particularly by Sch. "N," act March 3, 1883, as toys said goods are liable at no more than 35% ad valorem and not at 60% ad valorem, as charged by you."

16 Due appeal was made and suit was brought in due time.

Plaintiff further introduced evidence tending to show that the articles in question were in fact toys, and in addition that they were known in trade and commerce in March, 1883, and prior thereto

as toys, and were bought and sold under the denomination of toy plates, toy teas, and toy cans.

In behalf of the defendant evidence was introduced tending to show that these articles were not handled by toy-houses, but that they were bought and sold under the name of A B C plates, A B C mugs, A B C cans, and the cups and saucers were known as Minton teas or after-dinner coffees, and were also used in restaurants to serve coffee in, and that they were used by children to eat and drink out of, and not merely for the purpose of amusement.

The court, at the conclusion of the evidence, submitted the question to the jury as follows:

"You are to answer the question by yes or no whether these goods are or are not toys. You have heard the evidence, and all that it is necessary for me to do in leaving the case in your hands is to give you the definition of the word toy: "A toy is a plaything; a thing the main use or purpose of which is the amusement of children." Bearing that definition in mind and as instructed by the evidence, you will determine as to these articles whether they are or are not toys."

17 Thereupon counsel for plaintiff requested the court to charge that if these articles were known as toys in trade and commerce in March, 1883, and prior thereto, the plaintiff is entitled to recover; which request the court refused so to charge, and plaintiff's counsel duly excepted, and the exception was duly allowed.

And inasmuch as the foregoing matters of fact and law do not otherwise appear upon the records of the trial the judge before whom the cause was tried has settled and signed the foregoing as and for the plaintiff's bill of exceptions herein as of the 6th day of January, 1890.

E. HENRY LACOMBE.

Endorsed: N. S. 12276. U. S. circuit court, southern district of New York. William B. Maddock *vs.* Daniel Magone. Plaintiff's bill of exceptions. Charles Curie, attorney for plaintiff, 44 Exchange place, N. Y. Consented to. S. G. Clarke, of counsel. Edward Mitchell, U. S. att'y & att'y for def't. T. G. U. S. circuit court. Filed July 1, 1890. John A. Shields, clerk.

18 Supreme Court of the United States.

WILLIAM B. MADDOCK, Plaintiff in Error,
vs.
DANIEL MAGONE, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, comes the said plaintiff in error, by Charles Curie, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendant in error against the said plaintiff in error, whereas

6

w of the land the said judgment ought to have been the said plaintiff against the said defendant.

he said plaintiff prays that the judgment aforesaid for the oresaid and other errors in the record and proceedings afore- ay be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment. &c.

CHARLES CURIE,
Attorney for Plaintiff in Error.

19 [Endorsed:] 12276. United States Supreme Court. William B. Maddock, plaintiff in error, *vs.* Daniel Magone, defendant in error. Assignment of error. Charles Curie, attorney for plaintiff in error. Due service of a copy of the within assignment of error is hereby admitted this 31 day of July, 1890. Edward Mitchell, U. S. att'y, attorney for defendant in error. P. U. S. circuit court. Filed Jul- 31, 1890. John A. Shields, clerk. To —— ——, attorney for — in error.

20 Supreme Court of the United States.

WILLIAM B. MADDOCK, Plaintiff in Error,
v.
DANIEL MAGONE, Defendant in Error. } Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Edward Mitchell, U. S. att'y, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

EDWARD MITCHELL,
U. S. Att'y, Attorney for Defendant in Error.
P.

21 [Endorsed:] 12276. United States Supreme Court. William B. Maddock, plaintiff in error, *vs.* Daniel Magone, defendant in error. Joinder in error. Edward Mitchell, U. S. attorney, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 1st day of Aug., 1890. Chas. Currie, attorney for plaintiff in error. To Charles Curie, Esq., attorney for plaintiff in error. U. S. circuit court. Filed Aug. 1, 1890. John A. Shields, clerk.

22 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

WILLIAM B. MADDOCK
vs.
DANIEL MAGONE. } Bond for Costs.

Know all men by these presents that we, Henry Maddock and John L. Shea, are held and firmly bound unto the above-named Daniel Magone in the sum of two hundred & fifty dollars, to be paid to the said Daniel Magone; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 29th day of July, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named plaintiff in error has prosecuted his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute his said writ of error to effect and answer all damages and costs if said plaintiff in error fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HENRY MADDOCK,
48 *Park Pl., N. Y.* [SEAL.]
J. L. SHEA,
45 *William St., N. Y.* [SEAL.]

Sealed and delivered and taken and acknowledged this 29th day of July, 1890, before me—

WILLIAM H. NORTHUP,
[SEAL.] *Notary Public, Kings Co.*

Certificate on file in New York county.

23 [Endorsed:] 12276. U. S. circuit court, southern district of New York. William B. Maddock *vs.* Daniel Magone. Bond for costs on writ of error. Approved July 30, 1890. E. H. Lacombe. U. S. circuit court. Filed Jul- 30, 1890. John A. Shields, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss.:*

Henry Maddock and John L. Shea, being duly sworn, depose and say each for himself that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

HENRY MADDOCK,
48 *Park Place, N. Y.*
J. L. SHEA,
45 *William St., N. Y.*

Sworn to this 29th day of July, A. D. 1890, before me—

WILLIAM H. NORTHUP,

[SEAL.] *Notary Public, Kings Co.*

Certificate on file in New York county.

24 UNITED STATES OF AMERICA, *ss:*

To Daniel Magone, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and ninety, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William B. Maddock is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated July 30th, 1890

E. HENRY LACOMBE.

25 [Endorsed:] E. & A. A. 925. 12276. U. S. Supreme Court. William B. Maddock, plaintiff in error, against Daniel Magone, defendant in error. Citation. Charles Curie, attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 31 day of July, 1890. Edward Mitchell, U. S. attorney, attorney for defendant in error. 25 cts.

[File-mark:] U. S. circuit court. Filed Jul- 31, 1890. John A. Shields, clerk.

Endorsed on cover: Case No. 14,259. S. New York C. C. U. S. No. 244. William B. Maddock, plaintiff in error, *vs.* Daniel Magone, collector of the port of New York. Filed October 13, 1890.

Supreme Court of the United States.

OCTOBER TERM, 1893.

WM. B. MADDOCK vs. DAN'L MAGONE.	No. 244.

PLAINTIFF'S BRIEF.

Statement.

In 1886, Mr. Maddock imported into New-York some little china mugs, plates, cups and saucers, which he claimed to be "toys" and only dutiable under that name at 35 % *ad valorem*. (22 Stats. 512 top. Rec. 8 bottom.)

Sixty per-cent. *ad val.* was the duty imposed by Mr. Magone, as collector, under this clause of Schedule B, Act of 1883;—

China, porcelain and bisque ware, earthen, stone and crockery ware, including plaques, ornaments, charms, vases and statuettes, painted, printed or gilded, or otherwise decorated or ornamented in any manner, sixty per centum *ad valorem*." (22 Stats., 495.)

Plaintiff introduced evidence (1st) that the articles were in *fact* 'toys', and (2d) in addition that they were *known in trade and commerce* as 'toys' on and before Mar. 3, 1883, and bought and sold as "toy plates, toy teas and toy cans". (Rec. 8 bot. and 9 top.)

At the conclusion of the evidence only this question was submitted to the jury ;—

" You are to answer the question by yes or no, whether these goods are, or are not, toys ?" (Rec. 9.)

After stating it was only necessary to give them the definition of 'toy' (which he gave) the Judge concluded his charge of three sentences, in eight lines, with this instruction ;—

Bearing that definition in mind, and as instructed by the evidence, you will determine, as to these articles, whether they are, or are not, toys." (Rec. 9, fol. 16.)

Thereupon, counsel for plaintiff requested the court to charge, that

" if these articles were *known as toys in trade and commerce* in March, 1883, and prior thereto, the plaintiff is entitled to recover ;"—

which request was refused, and plaintiff was allowed an exception. (Rec. 9, fol. 17.) The jury found the articles were 'not toys', and the Court directed a verdict for the defendant. (Rec. 7 bottom.)

The special finding and general verdict of the jury, upon the single issue thus submitted to them, and the judgment thereon, being against the plaintiff, he sued out the present writ of error. (Rec. 7 bottom, 8 top, and 1.)

Assignment of Errors.

The plaintiff in error assigns for error ;—

I. That, after evidence had been introduced " tending to show that the articles were in fact toys ; and, IN ADDITION, *that they were known in trade and commerce* in March, 1883, and prior thereto, *as toys ;* and bought and sold under the denomination of 'toy plates,' 'toy

teas,' and 'toy cans' " (Rec. 8 and 9, fol. 16) the Court refused to give this requested instruction, viz. ;—

" That if these articles were known as 'toys' in trade and commerce in March, 1883, and prior thereto, the plaintiff is entitled to recover." (Rec. 9, fol. 17.)

II. The special verdict, rendered upon an immaterial issue, and finding only an immaterial fact, viz., that " the goods in suit are not toys." (Rec. 8, bottom, fol. 13.)

III. The general verdict, rendered by the direction of the Court, (as the result of such special finding) for the defendant. *(Ibid.)*

IV. The judgment, upon such finding and general verdict, for the defendant;—which should have been rendered for the plaintiff, upon the uncontradicted evidence of trade usage, *non obstante veredicto.* (8 top, fol. 14, and bottom fol. 16; and 9 top, fol. 16.)

V. The failure to enter judgment for the plaintiff, upon the uncontradicted evidence of the commercial meaning of the word 'toys.' (Rec. 8 bottom, and 9 top.)

POINTS.

I.

Issues presented.

The plaintiff, not being able nor bound to anticipate exactly the testimony of his own witnesses, nor at all that which his adversary might produce, introduced evidence tending to establish two facts, *either* of which would entitle him to recover, viz. ;

First. That his articles were *in fact* toys; and

Second. That, when the tariff of 1883 was passed, they were *commercially known* as 'toys.'

If he established the second, the first became no longer of any consequence to either party.

If he failed as to the second, the proof not showing any commercial usage, but leaving the ordinary acceptation and scope of term as its statutory meaning, it would be sufficient for him to establish that the common meaning of the word 'toys' included articles like his, to entitle him to a verdict.

"Plaintiff introduced evidence tending to show that the articles in question were *in fact* "toys". (Rec. 8 bot., fol. 16.)

Defendant introduced evidence as to the 'houses' that dealt in the goods under the name of 'A B C plates,' etc., 'Minton teas,' 'after-dinner coffees' etc.; and used for some other purposes besides amusement. (Rec. 9 top.)

Plaintiff further introduced evidence "*in addition*, that they were known in trade and commerce in March, 1883, and prior thereto, as '*toys*,' and bought, etc. (Rec. 8–9.)

This additional evidence the defendant offered NO *testimony to controvert*;—that above referred to, as to specific names of *some* of the articles, and their use, having no *tendency* to disprove the testimony that the whole of them were included within the *generic* term 'toys.'

There was absolutely *no* evidence that the commercial meaning of toys did *not* include these articles; and there was testimony proving, or "tending to prove" that it did. (Rec. 8 bottom.)

II.

Commercial meaning controlling.

Upon reading any clause of a statute, imposing duty upon the importation of things mentioned therein, the inquiry immediately arises, whether or not the term indicating the articles subjected to the duty has any commercial significance, greater or less than that attached to it in common speech. If it has, that meaning is the one intended by Congress. (130 U. S. 415.)

The ordinary meaning is but a secondary consideration; not considered at all, except in those instances where a negative answer is returned to the preliminary inquiry. *(Ibid.)*

The commercial designation, as we have frequently decided, *is the first* and most important designation to be ascertained in settling the meaning and application of the tariff laws. See Arthur v. Lahey, 96 U. S. 118, § 1; Worthington vs. Abbott, 124 U. S. 436. But *if the commercial designation fails* to give an article its proper place in the classification of the law, *then* resort must necessarily be had to the common designation."

Robertson v. Salomon, 130 U. S. 415 mid.

That suit was to determine whether beans were dutiable as 'seeds' or 'vegetables.' In Worthington v. Abbott iron in the form of bars, so that it might be conversationally called 'bar-iron,' was not so known to the trade, and was to be dutied according to the trade understanding. (124 U. S. 434 to 436.)

This is but the application of an universal principal to the levying of duties. It is always necessary *first* to know, whether in regard to a statute or a contract, what the subject thereof is, and what the language employed is understood to mean by that class whose chief business pertains to that subject-matter.

Arthur v. Morrison, 96 U. S. 110.

"Stock," in a contract between farmers or cattle-drovers, might mean a very different thing from that intended by one between Wall-Street brokers, or dry-goods merchants.

Wilcocks v. Phillips, 1 Wall. jr. 63.

Accordingly, the "leading case" of Smith v. Wilson, 3 B. & Ad. 166, sustained the contention that, in a sale of rabbit-warrens, one thousand meant twelve hundred rabbits; the Court citing with approval Mr. Starkie's statement of the rule, thus italicized;—

"Where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of *applying* the instrument to the proper subject-matter." 3 Starkie on Evi. 1083.

Common words thus have their ordinary meaning restricted or enlarged. Nothing is considered more certain than figures; which "cannot lie." But they tell a different story, according to the subject to which they are applied. As a 'thousand' means 'twelve hundred' among rabbit fanciers, a 'dozen' is thirteen among bakers.

In some places, and contracts there made, cotton in '*bales*' means in "*bags*" (Taylor v. Briggs, 2 C. & P. 525); "furniture" includes *provisions* (Brough v. Whitmore, 4 T. R. 206.) In insurance parlance, Sarsaparilla is not a 'root', because not of a perishable character. (Coit v. Commil. I. Co. 7 Johns., 385.) A 'day' means ten hours work; and one who toils for twelve and a-half consecutive hours is entitled to be paid for a day and a-quarter's work. (Hinton v. Locke, 5 Hill, 437.)

The Revised Statutes imposed fifty cents a pound, and 35% *ad val.*, on "*aniline* dyes and colors, by whatever name known". (R. S. 2d ed., 479 top.)

'Resorcine red' is not, *in fact*, an aniline dye or color; but was held to be dutiable as such, because *so*

considered in trade. The importers of it contended that the above-quoted phrase was a descriptive term, hence not to be affected by any commercial understanding of it, but to be construed to include "only such dyes as are in *fact* aniline by their constitution:" as to these their names, and the trade nomenclature, or usage, being inconsequential; only the above-indicated *fact* was to be established or disproved. This Court over-ruled this contention; holding the trade understanding controlling, though it did not correspond with the fact.

Pickhardt v. Merritt, 132 U. S. 254–7.

"The rule to be followed .... is that *descriptive terms* applied to articles of commerce shall be understood according to the acceptation given to them by *commercial* men in our own ports at the time of the passage of the act in which they are found."

Arthur v. Cumming, 91 U. S. 363.
Nichols v. Beard, 15 Fed. R. 437.

The rule of the tariff-meaning of words and phrases reminds me of the old Connecticut license-law, punishing one, who, having no license, was *reputed* to keep a place where spirits were sold; without any proof that the respondent had actually ever sold a drop—this not being an ingredient of the offence. State v. Morgan, 40 Conn. 44. The question was, what was his place *reputed* to be?

III.

Real issue ignored.

Such being the long and authoritatively established rule of tariff construction—that commercial understanding is the primal and controlling consideration—the Court steered the jury entirely aside from this in-

quiry, toward which our request sought to have their minds directed, and submitted to them the ascertainment of the fact whether or not our goods came within the ordinary, dictionary definition of 'toys,' which he read to them, and enforced upon their attention, as the *sole* point for their determination. (Rec. 9, fol. 16.)

This statement of this Court was completely ignored, viz.;—

"*If the commercial designation of the article give it its proper place in the classification of the statute,* RESORT TO THE COMMON DESIGNATION WAS UNNECESSARY AND IMPROPER."

Robertson v. Salomon, 130 U. S. 415 mid.

"*It is a question of mercantile construction. You had better lay aside your dictionary.*"

Houghton v. Gilbart, 7 C. & P., 701.

IV.

Special finding of an immaterial issue.

Upon the evidence and case, the jury gave no voluntary and responsive verdict.

Upon the single issue submitted to them, they returned this special verdict, "the goods in suit are not toys." (Rec. 7 bottom.)

Thereupon, and solely as a consequence of this specific finding of this one absolutely immaterial fact, a general verdict for the defendant was given only by direction. *(Ibid.)*

Bennett v. Butterworth, 11 How. 675 bot.

"It varies from the issue in a [the] substantial matter."

Patterson v. U. S. 2 Wh. 225.

The error is palpable upon the record, so is ground of reversal without any reference to it in the bill of

exceptions, whose only function is to bring into the record *facts* which otherwise would not appear there.

Suydam v. Williamson, 20 How. 428 433.
England v. Gebhard, 112 U. S. 505 top.
Clinton v. Mo. Pac. 122 U. S. 474.
Storm v. U. S., 94 U. S. 76, 81.

MARSHALL, C. J. stated that, *upon inspecting the record*, it had been *discovered* that the special verdict found in the case was too imperfect to enable the Court to found a judgment upon it. Barnes v. Williams, 11 Wh. 416.

Pensacola v. Perry, 120 U. S. 319.
Miller v. Peo. 25 Hun, 474.
Clay v. State, 43 Ala. 350.
St. v. Custer, 65 No. C. 339.

There being evidence (apparently uncontradicted) to establish commercial usage, it was error on the face of the record to direct the general verdict, as the legal result of the special finding.

Biggs v. Barry, 2 Curt. 261.
Stearns v. Barrett, 1 Mas. 169, 170, 173.

A special verdict must find *all* the facts necessary to sustain a judgment.

" A verdict is bad, if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. . . *Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue*; and although the Court in which the cause is tried may give form to a general finding, *so as to make it harmonize with the issue*, yet if it appears to that Court *or the Appellate Court*, that the finding is different from the issue, or *is only to a part of the matter in issue*, no judgment can be rendered upon the verdict."

Patterson v. U. S. 2 Wheat. 225.
Tuigg v. Treacy, 104 Pa. 498.

The verdict is " irresponsive " to the real issue. (2 Wh. 225.)

Sage v. Evins, 32 La. An. 1271.
State v. Blue, 84 No. C. 807.

V.

Judgment erroneous on the face of the record.

Taking the record as a whole, perceiving that evidence had been adduced affixing a commercial meaning to the word "toys," that the special verdict only found our goods were not toys in fact, and that the general verdict was then directed by the court, *suo motu*, as the necessary consequence of this finding;—the judgment is wrong as the verdict now stands. (Rec. 8-9, 7 bottom, 8 top.)

"The judgment is always a part of the record of the case; and, like the plea and the VERDICT, it needs no bill of exceptions, but is simply to be transcribed as part of the record."

Clinton v. Mo. Pac. 122 U. S. 474.
Storm v. U. S. 94 U. S. 76, 81.

"The judgment entered thereon must be the logical, legal conclusion, drawn *from what the jury has placed upon the record*, as the specific, exact and complete facts in the case."

Com. v. Grimes, 116 Pa. 452.

All the *jury* placed upon the record, in the case at bar, was their finding upon the single issue submitted by the Court; the verdict by direction was placed there by the controlling act of the Court.

The special finding must control the general conclusion. If they antagonize one another, the latter must be treated as surplusage.

1 Chitty, Cr. L. 4, 645.
Clay v. State, 43 Ala. 350.
State v. Custer, 65 No. C. 339.
Nelson v. Neeley, 63 Ind. 194.

VI.

Judgment is contrary to all material evidence.

A verdict and judgment which is contrary to all the material evidence is legally erroneous.

Mason v. Lord, 40 N. Y. 484.

In the case at bar, there being evidence that the articles were known to the trade as 'toys', and bought and sold accordingly (Rec. 8–9) all evidence as to the ordinary meaning of 'toys' became impertinent to the issue, unless the trade-usage was disproved.

"The common designation, as used in every-day life . . . . *would* have been very proper, in the *absence* of further light from commercial usage." Robertson v. Salomon, 130 U. S. 415.

As already noted, there was *no* evidence tending to discredit plaintiff's testimony establishing the trade nomenclature. The *only* proof made by defendant, or which his testimony tended to prove, was that these goods were not handled by toy-houses; were bought and sold as ABC plates, mugs and cans; and the cups and saucers known as Minton teas, or after-dinner coffees; were also used in restaurants; and by children, to eat and drink out of, and not *merely* for amusement. (Rec. 9, fol. 16.)

All this did not tend to disprove the direct testimony, as to how they were known in commerce.

In the Robertson-Salomon case,

"It was shown by the evidence that beans are generally dealt in under the simple designation of 'beans'; but this does not settle the question, as between the rival designations of 'seeds' and 'vegetables.'

Robertson v. Salomon, 130 U. S. 415.

Laces, known *as a class*, in trade and commerce, as

'torchons', but *never* sold under that name, but *always* by some specific name, as 'Smyrna', 'duchesse', etc., were held dutiable as thread-lace; as were laces *entirely of silk*, because also known to trade as 'thread-laces', although 'silk-laces' were specially enumerated in the Statute; and veils, every thread of which were silk, were not dutied under the enumeration of 'silk veils', because known to trade as 'crape.'

Smith v. Field, 105 U. S. 53.
Arthur v. Lahey, 96 *Id.* 114.
Same v. Morrison, *Ibid.* 108.

VII.

Any conflicting evidence, upon the material issue, was for the jury.

We consider the evidence of commercial usage, as embracing these goods within the term 'toys', to be uncontradicted.

Whoever sent the report of this cause, as tried below, to the Federal Reporter—and it was no one in plaintiff's interest—stated; "There was *conflicting* testimony on the point whether they were classed among merchants and dealers as 'toys.'" (41 F. R. 882.)

The record (Pp. 8 and 9) shows there was no *direct* denial of our *direct* testimony, that they were so known; but if this testimony was at all discredited, so that it would not be legal error to disregard it, it was only by the *inferences* which might possibly be drawn from those circumstances of dealing, naming and using, which defendant's testimony 'tended' to show. *(Id.* 9 top.*)*

Positive statement being met only by indirect inference (if at all) it was manifest error to turn the jury from the determination of this conflict, such as it was,

and to take their special verdict only upon a fact which this evidence made of secondary, or of no, importance; and to order a final judgment upon the basis of such special finding.

VIII.

Exceptions.

After proof of the fulfilment of the statutory conditions-precedent,

"Plaintiff further introduced evidence tending to show that the articles in question were in *fact* toys; and, in addition, that they were known in trade and commerce in March, 1883, and prior thereto, as 'toys'; and were bought and sold under the denomination of 'toy-plates,' toy-teas, and toy-cans." (Rec. 8 bottom and 9 top.)

Whether they were or not, in *fact*, toys was immaterial, strictly speaking, if they were so known to trade; but that there was evidence sufficient to go to the jury upon *that* issue (of the ordinary meaning) indicates something of the strength of the testimony as to commercial usage. In other words, if there was evidence which would have authorized the jury to find our goods were in fact 'toys,' *within the narrow limits of the brief definition* the Court read for their guidance, it can easily be seen how greatly it aided (as an argument before the jury) our contention that they were, *in commerce*, 'toys.'

On the other hand, a rejection of this contention and argument tended to our prejudice upon the issue which the Court did submit.

With the evidence indicated in the above-quoted paragraph in the case,

"Counsel for plaintiff requested the Court to charge that if these articles were known as 'toys' in trade and commerce in March, 1883, and prior thereto, the plaintiff is entitled to recover." (Rec. 9, fol. 17.)

This request was denied, and an exception allowed. *(Ibid.)*

To us, it seems that this refusal is palpable error.

All our preceding citations, from the record and of cases, and our observations as to the only issue presented, and allowed to control the result, emphasize this error, and indicate the judicial misconception in which it had its origin. Though our testimony establishing commercial usage was admitted, the judge evidently concluded that the word 'toys' was used in its ordinary, and not in any commercial, meaning; and therefore only submitted the question whether our goods came within the dictionary definition read.

How the judicial mind, illumined with all the long array of the decisions of this Court, could reach such conclusion, we are at a loss to imagine. It strikes us as a signal repetition of the error here corrected in the then-recent Robertson-Salomon case. In that case,

"The Court told the jury that 'the commercial designation of the article, or what it is called in trade and commerce, or the name 'bean' [toys] has nothing to do with the question.' We think the Court erred in this instruction. The commercial designation, as we have frequently decided, is the first and most important," etc., etc., etc. (130 U. S. 415.)

The Court here did the same thing again; by refusing to give the requested instruction—which merely assigned the proper legal effect to our testimony as to trade usage, if found true by the jury—and by submitting exclusively the single question of ordinary meaning, making that finding determine the result, without any regard to the proof of trade usage and nomenclature.

How he could admit our testimony establishing

trade-usage, and affixing commercially the name 'toys' to our goods, and then deny us all benefit of the established usage, we cannot comprehend;—unless it were that, convinced that the common meaning was the applicable one, he nevertheless purposed to permit us to spread upon the record evidence that there *was* a commercial usage, that this Court, with the proof of the existence of both meanings before it, might decide which was applicable.

But this is precisely the point it has decided, forty times over; that the commercial sense will control the classification without regard "to the material of which they may be made, or the use to which they may be applied."

Am. v. Worthington, 141 U. S. 471.

In that case, the importation was No. 35 linen thread, used in sewing-machines (141 U. S. 470) but particularly adapted to making nets, whence it derived (or was included in) the name "gilling twine"; which, as well as "linen thread", was dutied *eo nomine* in the act of 1883. This commercial name was held to be paramount, and the contrary ruling of the circuit court in Massachusetts was reversed. The article was that kind of linen thread known as gilling-twine.

If China dolls were imported, three clauses of the act of 1883 would be found, either of which would affix a duty thereto, in the absence of the other two. According to material, "china ware" includes them; according to their general description, "toys"; but the specific enumeration of "dolls" (without regard to material) takes them out of the other clauses, for dutying purposes.

So the commercial understanding, that our tiny plates and cups are "toys", takes them out of the general provision for ware of that material, without regard to the occasional use of these toys to serve the fancy of children of larger growth.

"Toys" is as capable of expansion in its meaning as

"Counsel for plaintiff requested the Court to charge that if these articles were known as 'toys' in trade and commerce in March, 1883, and prior thereto, the plaintiff is entitled to recover." (Rec. 9, fol. 17.)

This request was denied, and an exception allowed. *(Ibid.)*

To us, it seems that this refusal is palpable error.

All our preceding citations, from the record and of cases, and our observations as to the only issue presented, and allowed to control the result, emphasize this error, and indicate the judicial misconception in which it had its origin. Though our testimony establishing commercial usage was admitted, the judge evidently concluded that the word 'toys' was used in its ordinary, and not in any commercial, meaning; and therefore only submitted the question whether our goods came within the dictionary definition read.

How the judicial mind, illumined with all the long array of the decisions of this Court, could reach such conclusion, we are at a loss to imagine. It strikes us as a signal repetition of the error here corrected in the then-recent Robertson-Salomon case. In that case,

"The Court told the jury that 'the commercial designation of the article, or what it is called in trade and commerce, or the name 'bean' [toys] has nothing to do with the question.' We think the Court erred in this instruction. The commercial designation, as we have frequently decided, is the first and most important," etc., etc., etc. (130 U. S. 415.)

The Court here did the same thing again; by refusing to give the requested instruction—which merely assigned the proper legal effect to our testimony as to trade usage, if found true by the jury—and by submitting exclusively the single question of ordinary meaning, making that finding determine the result, without any regard to the proof of trade usage and nomenclature.

How he could admit our testimony establishing

trade-usage, and affixing commercially the name 'toys' to our goods, and then deny us all benefit of the established usage, we cannot comprehend;—unless it were that, convinced that the common meaning was the applicable one, he nevertheless purposed to permit us to spread upon the record evidence that there *was* a commercial usage, that this Court, with the proof of the existence of both meanings before it, might decide which was applicable.

But this is precisely the point it has decided, forty times over; that the commercial sense will control the classification without regard "to the material of which they may be made, or the use to which they may be applied."

Am. v. Worthington, 141 U. S. 471.

In that case, the importation was No. 35 linen thread, used in sewing-machines (141 U. S. 470) but particularly adapted to making nets, whence it derived (or was included in) the name "gilling twine"; which, as well as "linen thread", was dutied *eo nomine* in the act of 1883. This commercial name was held to be paramount, and the contrary ruling of the circuit court in Massachusetts was reversed. The article was that kind of linen thread known as gilling-twine.

If China dolls were imported, three clauses of the act of 1883 would be found, either of which would affix a duty thereto, in the absence of the other two. According to material, "china ware" includes them; according to their general description, "toys"; but the specific enumeration of "dolls" (without regard to material) takes them out of the other clauses, for dutying purposes.

So the commercial understanding, that our tiny plates and cups are "toys", takes them out of the general provision for ware of that material, without regard to the occasional use of these toys to serve the fancy of children of larger growth.

"Toys" is as capable of expansion in its meaning as

any of the tariff designations heretofore called to the attention of the Court. In a certain sense, "all are but toys";—"some livelier plaything gives his youth delight . . . and beads and prayer-books are the toys of age."

This is but a poetic license in the use of language; but there is a *commercial* license also permissible. If the poet may speak of all serious things as toys, the merchant may fairly embrace within his understanding of the word articles *susceptible*, to some extent, of a practical use, by adults. Each may rightly employ the language of his craft; and, in interpreting, we must enquire in what sense—in the language of what craft—was the word employed.

The treasury department has promulgated decisions upon both sides of this question. A. D. 1878, SS. 3485; A. D. 1887, SS. 3012; *contra*, A. D. 1889, SS. 9639.

This last 'decision' modified that of 1888, SS. 8911, accepting the judgment in the suit, at Philadelphia, of Zeh *et al.* v. Hasterlik, finding these were 'toys,' the Solicitor-General having dismissed the writ of error, No. 270, Oct. Tr. 1887. 127 U.S. 783.

Jan. 8/94 affirmed, Cadwallader v. Zeh, No 106, current term.

Zeh v. Cadwallader, 42 F. R. 526, Verdict for pltff.

In the act of 1890, the phraseology of both provisions, as to china and as to dolls, has been changed.

Par. 100. "China, etc., ware including plaques, ornaments, *toys*, etc., etc.

Par. 436. "Dolls, doll-heads, toy-marbles . . . and all other toys, *not* composed of rubber, china," etc.

As the Attorney-General substantially observed in his briefs in some earlier cases on the docket, the Treasury Department keeps a watch upon legislation, and has incorporated into the text of a tariff such of its rulings upon the preceding law as have been overturned by judicial decisions.

IX.

The judgment of the Court below should be reversed, with costs.

EDWIN B. SMITH,
120 Broadway, New-York,
Of counsel for plaintiff.

Office Supreme Court U. S.
FILED.
JAN 29 1894
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

WILLIAM B. MADDOCK, PLAINTIFF in error,
v.
DANIEL MAGONE, COLLECTOR OF the Port of New York.
} No. 244.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

WILLIAM B. MADDOCK, PLAINTIFF in error, v. DANIEL MAGONE, COLLECTOR OF the Port of New York.	No. 244.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT O NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

This was an action to recover duties paid under protest upon an importation of china toys. The importations were made in 1886, so that the case is governed by the tariff law of 1883.

The statutory provisions in question are the same as those discussed in the similar case of *Cadwalader* v. *Zeh* decided at this term. The goods were mugs, plates, cups and saucers made of china, of small size. The importer

claimed that they were dutiable as toys. The collector claimed that they were dutiable as earthenware. The jury found specially a verdict that they were not toys, and therefore by direction found a general verdict for the collector. The only exception in the record is to the denial of a request to charge.

STATEMENT OF FACTS.

The court stated to the jury the definition of the word "toy," as follows: "A toy is a plaything; a thing the main use or purpose of which is the amusement of children." It then left to the jury the question whether these goods were or were not toys. No exceptions were taken to the charge.

Plaintiff's evidence upon the question submitted to the jury tended to show:

> That the articles in question were in fact toys.

Defendant's evidence upon the same question tended to show that:

> These articles * * * were * * * used in restaurants to serve coffee in, and that they were used by children to eat and drink out of, and not merely for the purpose of amusement.

Plaintiff also attempted to raise the question of commercial designation, and his evidence on this point tended to show:

> That they were known in trade and commerce in March, 1883, and prior thereto, as toys, and were bought and sold under the denomination of toy plates, toy teas and toy cans.

Defendant's evidence upon this point tended to show:

> That these articles were not handled by toy houses, but that they were bought and sold under the name of ABC plates, ABC mugs and ABC cans, and the cups and saucers were known as Minton teas or after-dinner coffees.

Plaintiff requested the court to charge:

> That if these articles were known as toys in trade and commerce in March, 1883, and prior thereto, the plaintiff is entitled to recover.

The court refused so to charge, and this refusal is the subject of the only exception in the record.

Plaintiff erroneously states that on the special verdict the court directed a general verdict. In fact, after a special verdict answering the only disputed question, the court then directed a general verdict on the whole case.

ARGUMENT.

It is settled by *Cadwalader* v. *Zeh*, *supra*, that the word "toy" is subject to evidence of commercial designation.

The court held in that case that the evidence in the record then before it was conflicting upon the question whether a commercial designation existed within the meaning of the authorities, and therefore that the verdict of the jury upon the point was conclusive. The plaintiff in error in that case was the collector. He argued that the evidence did not show uniformity of the commercial usage sufficiently to justify its submission to the jury. He had not, however, taken this point specifically at the trial, and it was raised for the first time in this court in sup-

port of a general form of exception. This court did not pass upon the point, and we assume that it was not regarded as sufficiently raised by the record.

It was also assumed by both parties in that case that the date to which evidence on the subject of commercial designation should be directed was March 3, 1883, the day of the approval of the tariff act under which the articles were imported. The plaintiff in error had himself fixed that date in his requests to charge, and could not, therefore, be heard to question it.

It is now the importer who is the plaintiff in error, and upon him the burden of showing error is cast. His sole reliance must be his single request to charge, and this request can not avail him if it is too broad or otherwise incorrect in any particular. "A party can not assign for error the refusal of an instruction to which he has not a right to the full extent, as stated, and in its precise terms." (*Catts* v. *Phalen*, 2 How., 376, 382; *Haffin* v. *Mason*, 15 Wall., 671, 674.) So far as the evidence is not fully set forth in the record, the intendments are in favor of the action of the court below. (*Russell* v. *Ely*, 2 Black, 575, 580).

We claim on behalf of the defendant in error that the request to charge was objectionable in two respects: First, it was too broad, in view of the evidence, in not containing the qualification that the trade usage must be uniform and extending throughout the trade; second, the date named should not have been March, 1883, when the then existing tariff act was passed, but June, 1864, when toys were introduced into our tariff legislation.

I.

The names and residences of the witnesses and the details of their testimony are not given in the record. The presumptions, as above stated, are in favor of the judgment below. Plaintiff testified to *a* trade name, not *the* trade name. The evidence as set forth in the record is susceptible of the construction that there were two or more commercial designations applicable to the china articles in suit, each being partial or local only. Assume that the evidence if fully set forth would show clearly that construction to be correct; then there would be no question for a jury at all. Assume, on the other hand, that the evidence would not clearly show that state of case, but that it could be inferred therefrom either that there were two or more partial or local designations, or, on the other hand, that there was one uniform designation as to which the evidence was in conflict; then it would be proper to leave the case to the jury, but only with the caution that the usage must be uniform to justify a verdict for the importer on that point.

But plaintiff's witnesses do not appear from the record to have made any claim of uniformity or universality even in the port of New York. So far as the record indicates, their claim may have been confined to one trade only or to one branch of a trade. They do not appear to have claimed that the articles were handled by toy houses at all, while defendant's witnesses testified to the contrary on that point. Plaintiff's witnesses may have been from Philadelphia; defendant's from New York or Trenton.

Plaintiff's witnesses may have been all general importers of earthenware; defendant's witnesses toy dealers or potters.

Presumptively the commercial meaning of a word is the same as the colloquial meaning. (*Swan* v. *Arthur*, 103 U. S., 597.) Commercial designation is one form of commercial usage, and such a usage can not be given legal effect unless it be a uniform usage. (*Garrison* v. *Memphis Insurance Company*, 19 How., 312, 317; *Dodge* v. *Hedden*, 42 Fed. Rep., 446; *In re Blumenthal*, 49 Fed. Rep., 226; *Rapp* v. *Palmer*, 3 Watts, 178; *Collings & Company* v. *Hope*, 3 Wash. C. C., 149; *Foye* v. *Leighton*, 22 N. H., 71, 76 and cases cited; *Butler* v. *City of Charlestown*, 7 Gray, 12, 16.) If the testimony tends to prove a custom, and does not tend to prove that the custom is uniform and certain, it is error to submit the evidence to the jury. (*Citizens' Bank* v. *Grafflin*, 31 Md., 507, 520; *United States* v. *Buchanan*, 8 How., 83, 102; *Adams* v. *Pittsburg Ins. Company*, 76 Pa. St., 411; *Schurr* v. *Savigny*, 85 Mich., 144; *Bowling* v. *Harrison*, 6 How., 248; *Greenwich Insurance Company* v. *Waterman*, 54 Fed. Rep., 839.) Extracts from the opinions in the two last named cases are contained in the brief for defendant in error in *Berbecker* v. *Robertson*, No. 245 of this term, in which case a similar question is involved.

But in the matter of uniformity more must be required in the way of commercial usage in order to affect the language of the statute than is required when it is invoked to affect the language of a mere contract. The latter may be a local usage only; the former must be a usage general

throughout the whole country, or so much thereof as participates in the trade in question. Congress can not be presumed to refer to any custom not uniform through the whole extent of the country and so notorious that the legislators must be presumed to have been acquainted with it. It is a familiar rule, reaffirmed in *Cadwalader* v. *Zeh*, above cited, that the statutory meaning does not change as commercial designations change, but that it remains fixed from the date of the act. The same uniformity must apply in space as well as in time. It can not be that one meaning is intended for New York, another for Philadelphia. As expressed by Judge Maxwell in his work on statutory construction: "An universal law can not receive different interpretations in different towns. A mere local usage cannot be invoked to construe a general enactment, even for the locality." (Endlich on Interpretation of Statutes, § 362.)

Making proper intendments in favor of the action of the court below, and assuming that the witnesses for the respective parties testified in relation to different localities or different branches of trade, we may apply the language of the New York Court of Appeals, speaking through Judge Hand, in *Dickinson* v. *City of Poughkeepsie* (75 N. Y., 65, 77):

> The burden being upon the plaintiffs to vary and limit the meaning of the writing by usage * * * they must show a usage uniform, general, presumably known to the parties, and not local, partial, or personal. [Citing authorities.] This, in my opinion, they failed to do; and a jury were not authorized, from the whole evidence, to find such uniform bind-

ing custom. It is not, of course, intended to hold that, to prove a valid custom, all the witnesses sworn on both sides must agree about it. They may differ as to its existence in the same place or in all places, and this would raise a question for the jury; but here is no such conflict. The plaintiffs' witnesses prove that they followed and knew of such custom as to some localities and contracts; and the defendants show that there was no such custom in other localities and as to other contracts, no witness assuming to say that the custom was universal. The result of this evidence was not therefore a conflict as to a uniform custom, but a demonstration that the custom was local and partial. The result is that there was no sufficient proof to vary the meaning of the contract.

II.

A familiar rule, as we have said, was recognized and applied in *Cadwalader* v. *Zeh*, *supra*, that the meaning of each tariff act is fixed when it is passed, and can not be affected by usages subsequently arising. In that case testimony was offered, and excluded, intended to show that the usage in 1888, when the importations in suit were made and the trial was had, was as claimed by plaintiff in error. This court held the evidence irrelevant, because "it certainly had no tendency to prove what that meaning was at the time of the passage of the act of 1883." (End of Opinion.)

Now assume that the evidence thus excluded was true, and if admissible would have convinced the court and jury. Assume that, while the word "toy" had the meaning claimed by the importers in 1883, it had changed its

meaning by 1888. Assume that the act of 1890 had repeated the provision in question without any apparent change of signification. Would, then, the testimony as to the new usage—established in 1888 and still continuing, let us suppose, in 1890—have been competent? Would it be competent in a case now arising to put in new proof of commercial designation, and try over again the questions litigated in *Cadwalader* v. *Zeh?* Is the whole field thrown open every time that we have a new revision of the tariff laws? Is it impossible for Mr. Wilson and his Ways and Means Committee to rest assured in copying language that has been passed upon by courts and juries that they know what this language will be held to mean?

In other words, which is the controlling presumption—the presumption that words are used in the meaning understood among traders at the time of the passage of the act, or that the words are used in the same sense in which they were used in the next preceding general or special tariff act? The latter presumption is even more familiar than the former one. It has always been held that Congress in adopting the phraseology of a previous act *in pari materia* adopts therewith its judicial interpretation, and intends no change in the meaning. (*The Abbotsford*, 98 U. S., 440; *McDonald* v. *Hovey*, 110 U. S., 619; *United States* v. *Le Bris*, 121 U. S., 278; *Metropolitan Railroad Company* v. *Moore*, 121 U. S., 558).

The same rule should apply to commercial as to judicial interpretation.

This principle of continuity is well known in our tariff jurisprudence. In *Reiche* v. *Smythe* (13 Wall., 162) the controversy related to the tariff act of 1866, levying

ing custom. It is not, of course, intended to hold that, to prove a valid custom, all the witnesses sworn on both sides must agree about it. They may differ as to its existence in the same place or in all places, and this would raise a question for the jury; but here is no such conflict. The plaintiffs' witnesses prove that they followed and knew of such custom as to some localities and contracts; and the defendants show that there was no such custom in other localities and as to other contracts, no witness assuming to say that the custom was universal. The result of this evidence was not therefore a conflict as to a uniform custom, but a demonstration that the custom was local and partial. The result is that there was no sufficient proof to vary the meaning of the contract.

II.

A familiar rule, as we have said, was recognized and applied in *Cadwalader* v. *Zeh, supra,* that the meaning of each tariff act is fixed when it is passed, and can not be affected by usages subsequently arising. In that case testimony was offered, and excluded, intended to show that the usage in 1888, when the importations in suit were made and the trial was had, was as claimed by plaintiff in error. This court held the evidence irrelevant, because "it certainly had no tendency to prove what that meaning was at the time of the passage of the act of 1883." (End of Opinion.)

Now assume that the evidence thus excluded was true, and if admissible would have convinced the court and jury. Assume that, while the word "toy" had the meaning claimed by the importers in 1883, it had changed its

meaning by 1888. Assume that the act of 1890 had repeated the provision in question without any apparent change of signification. Would, then, the testimony as to the new usage—established in 1888 and still continuing, let us suppose, in 1890—have been competent? Would it be competent in a case now arising to put in new proof of commercial designation, and try over again the questions litigated in *Cadwalader* v. *Zeh?* Is the whole field thrown open every time that we have a new revision of the tariff laws? Is it impossible for Mr. Wilson and his Ways and Means Committee to rest assured in copying language that has been passed upon by courts and juries that they know what this language will be held to mean?

In other words, which is the controlling presumption—the presumption that words are used in the meaning understood among traders at the time of the passage of the act, or that the words are used in the same sense in which they were used in the next preceding general or special tariff act? The latter presumption is even more familiar than the former one. It has always been held that Congress in adopting the phraseology of a previous act *in pari materia* adopts therewith its judicial interpretation, and intends no change in the meaning. (*The Abbotsford*, 98 U. S., 440; *McDonald* v. *Hovey*, 110 U. S., 619; *United States* v. *Le Bris*, 121 U. S., 278; *Metropolitan Railroad Company* v. *Moore*, 121 U. S., 558).

The same rule should apply to commercial as to judicial interpretation.

This principle of continuity is well known in our tariff jurisprudence. In *Reiche* v. *Smythe* (13 Wall., 162) the controversy related to the tariff act of 1866, levying

a certain duty on "horses, mules, cattle, sheep, hogs, and other live animals." The previous act of 1861 had levied a duty on "animals, living, of all kinds; birds, singing and other," etc. One of the grounds of decision is stated by Mr. Justice Davis, in delivering the opinion of this court, as follows:

> And it is fair to presume, in case a special meaning were attached to certain words in a prior tariff act, that Congress intended they should have the same signification when used in a subsequent act in relation to the same subject matter. * * * It is quite manifest that Congress, adopting the popular signification of the word "animals," applied it to quadrupeds and placed birds and fowls in a different classification. Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are *in pari materia*, and it will be presumed that if the same word be used in both and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act in the absence of anything to show a contrary intention.

The decision was based also on the special language of the act of 1866 and the rule *ejusdem generis;* but the language above quoted gives the first and at least equally important ground of decision. In the subsequent case of *Barber* v. *Schell* (107 U. S., 617, 622), Mr. Justice Blatchford, speaking of the Reiche case, says: "That case was decided on the ground that the word 'animals' in the act of 1861 did not include 'birds,' and so could not include them in the act of 1866."

The presumption of continuity was held to govern the commercial designation in Roosevelt v. Maxwell, 3 Blatchf., 391, 395; DeForest v. Lawrence, 13 How., 274, 282.

Each tariff act is the basis of its successor. Each is carefully drawn, with all the judicial and departmental constructions of the preceding acts kept constantly in view. No word is supposed to change its meaning, unless a special intent to that end is disclosed upon the face of the revision. The date at which the commercial designation of each term is fixed must be the same, whether or not that commercial designation shall have been judicially ascertained prior to the enactment of the next succeeding revision of the tariff laws. It is, therefore, respectfully submitted that this date is presumptively the date of the first introduction of the term into tariff legislation. Such a rule would avoid such abuses as that testified to in *Cadwalader* v. *Zeh* by some of the witnesses for the Government, namely, the invoicing of articles as toys from 1864 to 1883, when toys were subject to the higher duty, and then as earthenware from 1883 on; evidence which, though found to be irrelevant or untrue by the jury in that case, may, nevertheless, indicate a truth in many other cases.

It has, indeed, often been stated in judicial opinions that the date of the passage of the tariff act governing the importation was the test date; but we believe that these remarks have always been made in cases where the question raised was between the date of that act and the date of the importation, and where the attention of the court was not called to the argument here made.

The duty on toys dates from the tariff act of June 30, 1864, Ch. 171, 13 Stat., p. 213, levying a duty of 50% ad valorem on "wooden and other toys for children." The words "for children" have been dropped, but it is

presumed that an amendment of this sort is not intended to change the meaning of the act unless the contrary plainly appear (*McDonald* v. *Hovey*, 110 U. S., 619, 629); and in this case the rule *noscitur a sociis* clearly shows that there is no change of meaning intended, for toys are now joined in the same clause with dolls. The words "for children" seem to have been dropped as mere surplusage.

III.

This disposes of the only exception taken at the trial.

Counsel, however, strive to secure a review of the judge's charge and direction of general verdict, on the ground that they are *errors apparent on the face of the record*, and therefore no exception is necessary.

No error, however, would appear without the aid of the bill of exceptions. The record, *dehors* the bill, simply shows that a special verdict was found on a point whose relevancy does not appear, and that a general verdict was directed.

Plaintiff's proposition, therefore, is equivalent to saying that no exception is ever necessary to secure a review in a federal court.

This seems to be the fact as to jurisdictional questions. We set forth the authorities in the brief for defendant in error in *Famous Smith* v. *United States*, No. 1003 of this term, and the court there reversed the judgment upon a jurisdictional point not raised by the record *dehors* the bill of exceptions, and not suggested by any exception therein contained. We understand this case as settling the rule so far as jurisdictional objections are concerned.

We know of no such precedent in any other case.

Except as to jurisdictional objections, there seems to be no doubt that the court upon a writ of error can look into the bill of exceptions only to decide questions which are raised by a specific exception. The only points that can be raised here without an exception are errors or defects in the other portions of the record; that is, matters not resting in parol, such as those discussed in *Slacum* v. *Pomery* (6 Cranch, 221, 225); *Garland* v. *Davis* (4 How., 131); *Rogers* v. *Burlington* (3 Wall., 654, 661); *New Orleans R. R. Co.* v. *Morgan* (10 Wall., 256, 260); *Insurance Co.* v. *Piaggio* (16 Wall., 378, 386); *Moline Plow Co.* v. *Webb* (141 U. S., 616, 623). A bill of exceptions, as we understand the practice, is intended only to present the testimony bearing upon specific exceptions taken, and can not be turned into a statement of facts for any other purpose.

In *Pomeroy's Lessee* v. *Bank of Indiana* (1 Wall., 592, 602) Mr. Justice Clifford said:

> Suggestion was also made at the argument that if the paper was not available to the plaintiff as a bill of exceptions, still the evidence, as reported, might subserve his purpose as an agreed statement of facts; but we think not for several reasons. * * * *Thirdly*, because if both of the preceding objections were obviated, still it would not be competent to revise the rulings of the court below in that mode.

In *Hanna* v. *Maas* (122 U. S., 24, 26) Mr. Justice Gray said:

> The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in

> a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, etc.

The cases in this court relied upon by plaintiff's counsel do not bear him out.

In *Barnes* v. *Williams* (11 Wheat., 415) and *Bennett* v. *Butterworth* (11 How., 669, 675) there was no general verdict, and the special verdict did not support the judgment. In *Patterson* v. *United States* (2 Wheat., 221) the verdict did not conform to the pleadings.

In *Pensacola Ice Co.* v. *Perry* (120 U. S., 318) the verdict was insufficient on its face by failure to comply with a statutory requirement.

In *Suydam* v. *Williamson* (20 How., 427) and *Storm* v. *United States* (94 U. S., 76) no error was found and the judgment was affirmed. In *England* v. *Gebhardt* (112 U. S., 502) the writ of error was to an order remanding the case, which order was affirmed.

In *Clinton* v. *Missouri Pacific Railway* (122 U. S., 469, 474) the error was recited in the judgment, and the court, by Mr. Justice Miller, said:

> Now, if the facts on which the decision was made are to be found in *what may be properly called the record* of the case before the judge when he decided it, as it is here presented to us, then there was no need of any bill of exceptions in the matter.

The cases requiring an exception for purposes of review are very numerous. (*United States* v. *Breitling*, 20 How., 252, 254; *Poole* v. *Fleeger*, 11 Pet., 185, 212; *Walton* v. *United States*, 9 Wheat., 651; *Scott* v. *Lloyd*, 9 Pet., 418,

442; *Hutchins* v. *King*, 1 Wall., 53, 60; *Stanton* v. *Embrey*, 93 U. S., 548, 555; *Alexander* v. *United States*, 138 U. S., 353, 355; *Holder* v. *United States*, 150 U. S., 91; *Tucker* v. *United States*, Jan. 3, 1894.)

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.

O

> a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, etc.

The cases in this court relied upon by plaintiff's counsel do not bear him out.

In *Barnes* v. *Williams* (11 Wheat., 415) and *Bennett* v. *Butterworth* (11 How., 669, 675) there was no general verdict, and the special verdict did not support the judgment. In *Patterson* v. *United States* (2 Wheat., 221) the verdict did not conform to the pleadings.

In *Pensacola Ice Co.* v. *Perry* (120 U. S., 318) the verdict was insufficient on its face by failure to comply with a statutory requirement.

In *Suydam* v. *Williamson* (20 How., 427) and *Storm* v. *United States* (94 U. S., 76) no error was found and the judgment was affirmed. In *England* v. *Gebhardt* (112 U. S., 502) the writ of error was to an order remanding the case, which order was affirmed.

In *Clinton* v. *Missouri Pacific Railway* (122 U. S., 469, 474) the error was recited in the judgment, and the court, by Mr. Justice Miller, said:

> Now, if the facts on which the decision was made are to be found in *what may be properly called the record* of the case before the judge when he decided it, as it is here presented to us, then there was no need of any bill of exceptions in the matter.

The cases requiring an exception for purposes of review are very numerous. (*United States* v. *Breitling*, 20 How., 252, 254; *Poole* v. *Fleeger*, 11 Pet., 185, 212; *Walton* v. *United States*, 9 Wheat., 651; *Scott* v. *Lloyd*, 9 Pet., 418,

442; *Hutchins* v. *King*, 1 Wall., 53, 60; *Stanton* v. *Embrey*, 93 U. S., 548, 555; *Alexander* v. *United States*, 138 U. S., 353, 355; *Holder* v. *United States*, 150 U. S., 91; *Tucker* v. *United States*, Jan. 3, 1894.)

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.